Supreme Court, U.S.
FILED

No. 99-236

AUG 4 - 1999
OFFICE OF THE CLERK

In The
Supreme Court of the United States

GILBERT E. SLOOP,

Petitioner,

v.

ABTCO, INCORPORATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

Robert M. Elliot
Counsel of Record
ELLIOT, PISHKO, GELBIN & MORGAN, P.A.
Loewy Building, Suite 210
500 West Fourth Street
Post Office Box 20545
Winston-Salem, North Carolina 27120-0545
(336) 724-2828

Counsel for Petitioner

THE LEX GROUP • 1205 East Main Street • Suite 2 East • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3256

60 pp

QUESTION PRESENTED

WHETHER THE FOURTH CIRCUIT ERRED IN DETERMINING THAT PETITIONER, SUFFERING FROM THE SERIOUS HEALTH CONDITION OF ALCOHOLISM, WAS NOT ENTITLED TO LEAVE UNDER THE FMLA FOR TREATMENT FOR HIS DISEASE WHICH WAS PRECIPITATED BY HIS USE OF ALCOHOL?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner: Gilbert E. Sloop

Respondent: ABTCO, Inc.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES CITED iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 7

CONCLUSION 16

APPENDIX ..... App. i

TABLE OF AUTHORITIES CITED

PAGE

FEDERAL CASES

Sloop v. ABTCO, Inc.,
178 F.3d 1285, 1999 WL 280281
(4th Cir. 1999) 1

FEDERAL STATUTES

28 U.S.C. § 1254(l) 1

29 U.S.C. § 2601 ..... 1, 4, 7

29 U.S.C. § 2611(2)(A) 8

29 U.S.C. § 2611(4) 8

29 U.S.C. § 2612 ..... 2, 7, 10

29 U.S.C. § 2612(a)(1) 8

29 U.S.C. § 2612(c) 9

29 U.S.C. § 2612(d) 9

29 U.S.C. § 2612(e) 9

29 U.S.C. § 2613 ..... 2, 7, 9

29 U.S.C. § 2614 ..... 2, 7

29 U.S.C. § 2614(a)(1) 9

29 U.S.C. § 2615 3

29 U.S.C. § 2617(a)(1) 9

Supreme Court Rule 10 1

FEDERAL REGULATIONS

29 C.F.R. § 825.114 3

29 C.F.R. § 825.114(d) 11, 14

Petitioner respectfully requests that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

On August 19, 1998, the United District Court for the Western District of North Carolina filed its opinion granting summary judgment to defendant. (*App. 7, 25).*

On May 6, 1999, the United States Court of Appeals for the Fourth Circuit affirmed the district court judgment by unpublished *per curiam* opinion. *Sloop v. ABTCO, Inc.*, 178 F.3d 1285, 1999 WL 280281 (4th Cir. 1999); (*App. 1).*

JURISDICTION

The United States Court of Appeals for the Fourth Circuit affirmed summary judgment for the defendant on May 6, 1999. (*App. 1).* Petitioner seeks review by the United States Supreme Court pursuant to Rule 10 of the Supreme Court Rules and 28 U.S.C. § 1254(l) on the ground that the United States Court of Appeals for the Fourth Circuit has decided, in this action, an important federal question of first impression concerning the scope and applicability of the Family and Medical Leave Act, 29 U.S.C. § 2601, *et. seq.*, with respect to persons suffering from the disease of alcoholism. This issue has not been, but should be, settled by this Court, given its impact on the many persons who face addiction disease in the United States.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 2612

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

* * *

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2614

(a) Restoration to position

(1) In general

Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave--

(A) to be restored by the employer to the position of

employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

29 U.S.C. § 2615

(a) Interference with rights

(1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

29 C.F.R. § 825.114

(d) Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

STATEMENT OF THE CASE

Petitioner filed this action on June 26, 1996, alleging that he was discharged from his employment with respondent in violation of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et. seq.*

Facts

Petitioner was born on October 24, 1942. He is an alcoholic. In 1970, petitioner was initially employed with respondent's predecessor, then known as Abitibi. The company manufactured exterior hardwood siding and other building products. He served in the position of finishing operator. Over the next 22 years, petitioner performed his responsibilities well for the company. In 1971, he was promoted to foreman, and was responsible for supervising employees in his department.

In 1992, petitioner's employer was acquired by respondent. Respondent is a large nationwide company with plants all over the United States. As a result of the acquisition, there was a reorganization of positions during the fall of 1992. At that time, petitioner was demoted to the position of utility lead person, an hourly position in the plant.

December, 1992 - July, 1994

As a result of his demotion, petitioner experienced significant stress. On Christmas night, 1992, petitioner consumed alcohol for the first time in over twenty years. The next day he told his wife that he was going out to get some beer because he thought it would do him some good. He drank beer off and on for the next several weeks.

In early January, 1993, petitioner called his supervisor and told him that he had started drinking, and would need to stay out of work to get some help. Petitioner was ultimately advised to undergo residential treatment at an

alcoholic treatment center. Petitioner agreed to the treatment, and respondent approved his leave for this purpose. From January 18, 1993 to February 8, 1993, petitioner was treated at the residential facility and was placed on short term disability. Following his treatment, petitioner returned to work.

From February, 1993 to July, 1994, petitioner had several relapses. Generally, the scenario was the same. On each occasion he lost his resistance and started drinking, and ultimately admitted himself to the detoxification center for withdrawal. During each of these episodes, petitioner called his supervisor before he was to return to work and requested vacation or sick leave. On each occasion the company approved his leave. Petitioner never drank on the job, and never reported to work after drinking. Nor did petitioner violate respondent's absentee policy which provides for disciplinary action in the event of "over three consecutive unexcused absences." Petitioner never had an unexcused absence.

Petitioner's Termination: July 1994

During the holiday weekend of July 4, 1994, petitioner had another relapse. On July 2, he started drinking, and continued drinking for the next two days while he was out of work for the holiday. Finally, on the night of July 4, petitioner's wife, concerned for his safety, involuntarily committed petitioner. Prior to his commitment, the examining physician determined that petitioner was "alcohol dependent" and dangerous to himself and others.

Based on the findings, the District Court of Wilkes County found that petitioner was dangerous to himself and others and ordered him to undergo residential treatment for his condition. Petitioner was referred to a residential treatment facility.

On the afternoon of July 4, 1994, during the above episode, petitioner's wife called his supervisor. She informed him that petitioner would be unable to return to work, as scheduled, on the next morning, and the supervisor approved petitioner's absence for July 5. (*App. 35).* Petitioner was committed, and treatment was commenced during the early morning hours of July 5. Later that day, petitioner's wife called the supervisor again, and told him that petitioner had been committed and was in treatment, and would need extended leave for residential treatment. The supervisor responded that she would need to call the human resources manager.

Petitioner's wife called the manager, and explained that petitioner had been committed because of drinking, had commenced treatment, and would need to undergo extended treatment at a treatment center for several weeks. She requested that the company give petitioner leave to obtain treatment and noted that he had accrued vacation which he could take.

On July 6, 1994, the manager and other management officials denied petitioner's request for leave, and terminated his employment.

Subsequent Events

Petitioner was successfully treated for his condition until his discharge on August 8, 1994. Since petitioner's discharge from the facility he has not consumed alcohol.

REASONS FOR GRANTING THE PETITION

In 1993, Congress passed the Family and Medical Leave Act, 29 U.S.C. § 2601, *et seq.* (FMLA). The FMLA was enacted to provide job protection to employees of larger companies who must be absent for limited periods as a result of serious health problems or the birth or adoption of a baby.

The FMLA establishes specific rules governing leaves of qualified employees. A qualified employee who seeks leave for treatment of a serious health condition is entitled to leave of up to 12 weeks each year for treatment of a serious health condition. *29 U.S.C. § 2612.* At the conclusion of the leave period, the employee is entitled to reinstatement in his former or an equivalent position. *29 U.S.C. § 2614.* The FMLA provides safeguards to protect employers and employees from abuse of the leave provisions. *29 U.S.C. § 2613.*

In dismissing petitioner's claim, the lower courts unnecessarily limited the protection of the FMLA. Respondent's actions in denying petitioner leave and terminating his employment were in direct violation of the FMLA. The district court, recognizing that petitioner had met the primary elements of this claim, concluded "that the plaintiff's use, or consumption, of alcohol during the weekend of July 4, 1994, precipitated his need for treatment and, therefore, he is not entitled to leave under the FMLA." (*App. 21*). The court of appeals affirmed, incorrectly holding that "petitioner was not able to attend work on July 5, 1994, not because of his treatment, but because of his heavy consumption of alcohol." (*App. 5*). In truth, petitioner was being treated for his condition as of the date he was scheduled to return to work.

The clear and unambiguous terms of FMLA require leave when an employee is seeking treatment for his serious health condition of alcoholism, whether or not the need for treatment was triggered by the use of alcohol. While the regulations, drafted by the U.S. Department of Labor,

preclude leave for substance abuse, they do not disqualify an alcoholic employee who is seeking treatment at the time leave is requested.

This petition, then, presents an important issue of first impression concerning the future application and scope of the FMLA to the many employees who suffer from the very real symptoms of the disease of alcoholism or drug addiction. Congress' intent in passing the FMLA was to recognize the need for treatment of such serious health conditions, and to balance job security for afflicted employees under treatment with protections for employers from abuse. The lower courts' decisions have shifted the balance in favor of employers with respect to addiction cases.

Significantly, the principle could also affect other employees, under a wide range of circumstances, whenever the need for treatment could be argued to result from some act attributable to the employee. For example, a diabetic who eats the wrong foods or forgets to take his insulin, or a cancer patient who fails to take his medication and suffers immediate reactions, could each find himself unprotected when the need for leave for treatment is required.

To prevent these unnecessary limitations on the protection of the FMLA, this Court should grant the petition.

A. The FMLA

The FMLA guarantees leave to employees of most employers for specified medical and family reasons. *29 U.S.C. § 2612(a)(1), supra, p. 2.* Eligible employees are those who have been employed by the employer for at least 12 months, and who have worked at least 1,250 hours during the previous year. *29 U.S.C. § 2611(2)(A).* Generally, all employers who employ 50 or more employees are covered. *29 U.S.C. § 2611(4).*

In order to take advantage of this entitlement, an employee must provide as much notice to the employer "as is

practicable" under the circumstances. *29 U.S.C. § 2612(e).* If the employer is not satisfied with the reasons stated by the employee, the employer can require "certification issued by the health care provider" of the employee to support the leave request. *29 U.S.C. § 2613.*

When an employer grants leave under the FMLA, it may require the employee to take any accrued vacation or sick leave as a part of the FMLA leave. Otherwise, the leave is unpaid, although the employer is required to continue paying premiums on the employee's group benefits. *29 U.S.C. § 2612(c) and (d).* Following his/her return from FMLA leave, an employee is entitled to resume his former or an equivalent position with the employer. *29 U.S.C. § 2614(a)(1).*

Upon proof that an employer has denied leave in violation of the FMLA, resulting in the employee's termination, an employee may pursue legal action against the employer. If she prevails, the employee is entitled to lost income, benefits and other damages, interest and liquidated damages. The employee is also entitled to reinstatement to her former position. *29 U.S.C. § 2617(a)(1).*

B. Petitioner Established the Elements of His FMLA Claim.

Petitioner claims that he was denied leave for treatment of a "serious health condition" in violation of the FMLA. To prevail, petitioner must prove the following elements:

1) That petitioner was an "eligible employee" and respondent was a covered employer at the time of his termination;
2) That petitioner (or someone on his behalf) requested leave for a "serious health condition" that rendered him

"unable to perform the functions" of his position;

3) That respondent interfered with his exercise of his rights by denying leave and terminating his employment; and

4) That petitioner suffered damages as a result of respondent's violation of the FMLA.

29 U.S.C. § 2612.

Petitioner established his eligibility for leave under the FMLA, and the lower courts agreed that petitioner requested leave because he was suffering from the "serious health condition" of alcoholism. Nevertheless, in response to the petitioner's request, the company apparently never considered petitioner's rights under the FMLA. When asked whether the company officials who made the decision to fire petitioner had considered his rights under federal law, the personnel manager testified on deposition:

> [O]ur conclusion was simply this, that we had gone and gone and gone through counseling and worked with him for a long lengthy period of time, and we felt like that that was sufficient expectations from anyone and that we had every right to have expected him to completely resolve the problem at that time.

Deposition of Swift, p. 78-9.

Thus, the reason repeatedly stated by the manager in support of the decision to terminate petitioner was that the company had done enough — that it had given petitioner several chances to correct his "drinking problem" and several warnings that if he did not, it would terminate him. And a

fair consideration of the entire record indicates that this was the *sole* basis for the company's decision.

The district court, apparently disapproving of the stated motive of the respondent, upheld the denial of petitioner's leave request for a different reason — that petitioner was unavailable for work because of his drinking. The court reasoned:

> Despite the treatment received by the plaintiff from [healthcare providers], the Court concludes that petitioner's use, or consumption, of alcohol during the weekend of July 4, 1994, precipitated his need for treatment and, therefore, he is not entitled to leave under the FMLA.

(App. 21). The court of appeals agreed with this conclusion. *(App. 5).*

The lower courts relied on the following regulation:

> Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

29 C.F.R. § 825.114(d).

Under the circumstances of this case, the above regulation does not bar coverage. By its literal terms, and particularly in the context of the FMLA, the regulation sends

several messages to employers and employees regarding the societal problem of substance abuse. First, it emphasizes the obvious — that substance abuse can be the symptom of a serious health condition under the FMLA, and can, therefore, give rise to coverage. This message was undoubtedly in response to claims that alcohol and drug addiction should not be covered. A second point emphasized by the regulation is that substance abuse by itself cannot justify leave under the FMLA. Any request for leave must be supported by a prescription by a health care professional for treatment of the underlying disease. Petitioner's request for leave did not conflict with the FMLA or the above regulation.

1. *Petitioner was unavailable for work because he was undergoing treatment for his serious health condition pursuant to the advice of his physician.* From July 2 to July 4, 1994, petitioner was drinking excessively and uncontrollably, as he relapsed in his disease. During this time period, petitioner was not scheduled to work for respondent, and thus, his drinking did not affect his work.

Petitioner was scheduled to work on July 5. On the evening of July 4, his wife called his supervisor, and requested the next day off. The supervisor approved petitioner's leave for the next day, responding that he would "take care of it." (*App. 35).* The supervisor had always "taken care of it" in the past, and this particular request was no different.[1]

By the early morning hours of July 5, petitioner was committed to a detoxification center, undergoing a withdrawal from alcohol which was necessary for further

---

[1] The court of appeals found that petitioner was not approved for leave on July 5. The evidence establishes that leave was indeed approved by his supervisor, who had always had authority in the past to excuse short absences. (*App. 35-37).* The fact that on the next morning the supervisor deferred to the personnel manager to respond to petitioner's request for *extended* leave, demonstrates the parameters of the immediate supervisor's authority to approve and excuse leaves of short duration, and *not* requests for longer periods of absence.

treatment of his disease. Dr. Belford evaluated petitioner's condition, and determined that he was dangerous to himself and others because of his alcohol dependency. By the afternoon of July 5, a second doctor, Dr. Bundy, the supervising doctor of The New River Detoxification Center, had also treated petitioner, recommending extended treatment for his disease.

On the morning of July 5, petitioner's wife called, on his behalf, and requested extended leave, based on the doctors' advice. When she reached the supervisor, he referred her to the personnel manager for consideration of the request. At that time — as the leave request was being made — petitioner was still an employee in good standing since his absence for the day had been approved. No disciplinary action was apparently being considered based on his use of alcohol over the previous days.[2]

Thus, the facts are clear and undisputed as to the sequence of events leading up to petitioner's termination. Petitioner was not unavailable to work at the time of his leave request because he was drinking. He was unable and unavailable to work on July 5-6, because he was being treated for his disease — treatment which was, as the district court recognized, "precipitated" by his use. The FMLA by its terms requires coverage under these circumstances.

2. *Neither the FMLA nor the Regulations bar a leave of absence for treatment which was initially triggered by a symptom of the disease of alcoholism—the use of alcohol.* The lower courts assume that treatment precipitated by use of alcohol does not justify leave under the FMLA. As pointed out above, that interpretation is in conflict with the express terms of the regulation. The regulation does not indicate that treatment "precipitated by use" precludes leave

---

[2] The personnel manager testified on deposition that if petitioner had been able to attend work, and had not required additional treatment after drinking, he "probably wouldn't" have been terminated. *Deposition of Swift, p. 74-5.*

under the FMLA. To the contrary, its assurance that "FMLA leave may . . . be taken for treatment for substance abuse" ensures that such treatment *is* covered. *29 C.F.R. § 825.114(d)*. It cannot reasonably be read to extend its bar to circumstances in which treatment is necessitated by use or abuse.

The admonition of the regulation that "absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave," does not apply to petitioner's circumstances. At the time of petitioner's request, he was in treatment for his problem, and his wife's request on his behalf was for extended treatment for his disease and the symptom of his disease, substance abuse. That request does not conflict with the clear meaning of the regulation.

3. *Petitioner was not terminated for absenteeism or unavailability for work, but because he had requested extended leave for treatment.* In fact, petitioner was not "excessively" absent from work over the relevant period prior to his termination. Nor did his disease of alcoholism impair his ability to do his work, either because of excessive absences or any other reasons. To the contrary, petitioner was, by all accounts, a committed and hard-working employee who attended work regularly, performed his responsibilities with dedication, and adhered to company work policies.

These facts are undisputed: 1) petitioner never came to work impaired and never used alcohol at work; 2) petitioner always called in advance and requested vacation or sick leave from his supervisor when he was suffering from a relapse; 3) all absences from 1992 to July 5, 1994, were approved and excused by respondent management; 4) all absences necessitated by petitioner's disease were covered by vacation and sick leave; 5) petitioner did not violate the

company's absentee policy;[3] and 6) petitioner was not absent from work during the relevant period as much as other employees who were retained by respondent.

The real reason for petitioner's termination had little to do with his absenteeism. Rather, as respondent's personnel manager testified repeatedly, respondent did not see fit to grant petitioner a leave of absence for treatment of alcoholism since it had done so in the past.

The FMLA does not give the employer the right to decide *when* and *how* and *for what reason* and *on what terms* it will abide by federal law, including the FMLA. However, the lower courts have done just that in exempting petitioner from FMLA protection. If allowed to stand, this limitation could narrow the scope of the FMLA.

---

[3] The company's personnel policy provided that three unexcused absences would be grounds for dismissal. Petitioner never had an unexcused absence.

CONCLUSION

The FMLA is of immense importance to employees throughout the country. Any limitation on its application without approval of Congress, should be rejected. Since this case presents such a limitation, as established by the district court and court of appeals, this Court should review the issue and reaffirm Congress' intent.

Accordingly, petitioner requests that this Court grant certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted this the 4th day of August, 1999.

Robert M. Elliot
Counsel of Record
ELLIOT, PISHKO,
GELBIN & MORGAN, P.A.
Post Office Box 20545
Winston-Salem, NC 27120-0545
Telephone: (336) 724-2828

Counsel for Petitioner

TABLE OF CONTENTS
Appendix to the Petition

Opinion,
United States Court of Appeals
for the Fourth Circuit
entered May 6, 1999 ..... App. 1

Memorandum and Order,
District Court of the United States
for the Western District of North Carolina
Statesville Division
entered August 18, 1998 ..... App. 7

Judgment,
District Court of the United States
for the Western District of North Carolina
Statesville Division
entered August 18, 1998 ..... App. 25

Memorandum and Recommendation,
United States District Court
for the Western District of North Carolina
Statesville Division
entered February 26, 1998 ..... App. 26

Excerpts of Affidavit of
Ms. Sloop
dated June 30, 1997 ..... App. 35

Personnel Change Order
dated July 8, 1994 ..... App. 37

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GILBERT E. SLOOP,
Plaintiff-Appellant,

v.

ABTCO, INCORPORATED,
Defendant-Appellee.

No. 98-2440

Appeal from the United States District Court for the Western District of North Carolina, at Statesville. Richard L. Voorhees, Chief District Judge. (CA-96-83-5-V)

Submitted: February 9, 1999
Decided: May 6, 1999
Entered: May 6, 1999

Before NIEMEYER, LUTTIG, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Robert M. Elliot, ELLIOT, PISHKO, GELBIN & ORGAN, P.A., Winston-Salem, North Carolina, for Appellant. Steven J. Fishman, Thomas A. Pinch, THE FISHMAN GROUP, Bloomfield Hills, Michigan, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Gilbert Sloop appeals from the district court's grant of summary judgment in favor of his former employer, ABTCO. The district court found that Sloop's absence from work during his involuntary civil commitment for detoxification was due to his use of alcohol and not covered by the Family Medical Leave Act ("FMLA"), 29 U.S.C.A. §§ 2601-2654 (West 1999). It thus concluded that ABTCO's termination of Sloop's employment did not violate the FMLA. Finding no error, we affirm.

This Court reviews a grant of summary judgment de novo. See United States v. Kanasco, Ltd., 123 F.3d 209, 210 (4th Cir. 1997). The moving party must demonstrate the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The facts are considered in the light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

The uncontroverted evidence before the district court established that Sloop had been an alcoholic since his teenage years. He was able to avoid alcohol during his first twenty-two years of working at the plant that ABTCO now owns. When ABTCO bought the plant, however, Sloop was demoted and shortly thereafter succumbed to his desire to have a drink. Within three weeks, he was given three weeks of paid leave by ABTCO for in-patient substance abuse treatment.

Following this residential treatment, Sloop returned to work. Thereafter, Sloop relapsed on different occasions over the next eighteen months and entered New River Area Detoxification Center six times, causing him to miss sixteen days from work. Sloop readily admitted the cause for his absences to his supervisor, Alfred Wagoner, and ABTCO's

Human Resources manager, Will Swift. In June of 1993 and January of 1994, following two periods of absence due to detoxification, Sloop was warned that his absences due to his relapses were unacceptable and that any recurrence of this problem would result in termination. After returning to work following the January 1994 detox, Sloop claimed that he sought and ABTCO denied leave to undergo residential treatment.[1]

In July 1994, Sloop began drinking alcohol again. On July 4, 1994, after he became abusive towards his wife, she called the police and had him involuntarily committed to the detox center. Drs. Bundy and Belford certified to the District Court of Wilkes County that involuntary commitment was necessary. Sloop's wife called Wagoner and Swift to relate that Sloop would not be at work for several weeks and that he would be undergoing residential substance abuse treatment. Sloop's wife asked Swift if Sloop could use his leave and reminded Swift that Sloop had accrued two weeks of vacation leave. According to Sloop's wife, Swift stated that he would have to discuss the matter with company officials.

On July 7, 1994, Swift called Sloop's wife and told her that Sloop was terminated effective July 5, 1994 for being absent due to his excessive drinking. Sloop was in the detox center until July 12, when the state court judge committed Sloop to a residential treatment facility.

Sloop brought this action against ABTCO alleging that he was discharged in violation of the FMLA. Both parties conceded that Sloop was an employee covered by the FMLA, see 29 U.S.C.A. § 2611(2)(A), and that ABTCO, an employer of more than fifty persons, was covered by the Act, see 29 U.S.C.A. § 2611(4). However, ABTCO argued that Sloop's absence was due to his use of alcohol and therefore

---

[1] ABTCO denies this claim. Resolution of this issue is not necessary as Sloop does not assert a claim for this incident.

not covered by the FMLA. Both ABTCO and Sloop moved for summary judgment.

The district court, adopting the magistrate judge's recommendation made pursuant to 28 U.S.C.A. § 636(b)(1)(B) (West Supp. 1998), granted ABTCO's motion for summary judgment. The district court found that Sloop was "treated" (for purposes of the FMLA) at the detox center because his condition was evaluated by two physicians who determined that he was dangerous to himself and others and should be involuntarily committed. See 29 C.F.R. § 825.114 (a)(2)(i)(A), 29 C.F.R. § 825.114(b). However, the court found that Sloop's absence from work was due to his use or consumption of alcohol during the July 4, 1994, weekend, not due to the court-ordered residential treatment ordered seven days later.[2] Thus, his absence, though later culminating in residential treatment, was not covered due to a regulation promulgated pursuant to the FMLA. See 29 C.F.R.§ 825.114(d).[3]

On appeal, Sloop claims that, because the district court found that he was suffering from a serious medical condition requiring continuing treatment, he was entitled to coverage under the express provisions of the regulation. However, the evidence supports the district court's finding that Sloop was unable to work due to his drinking. Sloop was

---

[2] The district court also opined that Sloop arguably did not provide proper notice or demonstrate that more favorable treatment was granted employees not exercising FMLA rights. Because we find that summary judgment was properly granted on the basis that Sloop's leave was due to his use of alcohol, rather than his treatment, we express no opinion on the viability of these grounds.

[3] 29 C.F.R. § 825.114(d) provides that "[s]ubstance abuse may be a serious health condition if the conditions of this section [enumerating what is a `serious health condition'] are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave." (emphasis added).

due at work on July 5, 1994 at 7:00 a.m. The medical records provided by the detox center reflect that his blood alcohol was .05 on July 5. Sloop was not admitted to the detox center until after 2:00 p.m. on July 5, 1994. Thus, the district court properly found that Sloop was not able to attend work on July 5, 1994, not because of his treatment, but because of his heavy consumption of alcohol.[4] Sloop also claims that the district court's interpretation of 29 C.F.R. § 825.114(d) conflicts with the provisions of the FMLA guaranteeing unpaid leave for treatment of this serious health condition. See 29 U.S.C.A. § 2612(a). We disagree.

The FMLA does not explicitly state whether alcoholism is a health condition even covered by the statute. Instead, when the FMLA was passed, Congress delegated to the Department of Labor the responsibility of defining FMLA's broad terms. See 29 U.S.C.A. § 2654. Thus, when interpreting the FMLA, we give controlling weight to regulations that speak to issues on which the statute is silent unless such regulations are arbitrary, capricious, or manifestly contrary to the statute. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984).

Other than Sloop's bare allegation that the exclusion of treatment necessitated by the use of alcohol from the coverage of the FMLA is contrary to the intent of Congress, Sloop fails to demonstrate why controlling weight should not be accorded 29 C.F.R.§ 825.114(d). There is no evidence

---

[4] On appeal, Sloop argues that because the effective date of his termination was July 6, that July 5 is irrelevant. Though his superiors did not make a decision until July 7, 1994, and then arbitrarily chose July 6 for the effective date, Swift's uncontroverted testimony establishes that Sloop was fired for disregarding the previous warnings to not miss work due to binge drinking. The unexcused absence began on July 5, and hence is relevant for determining whether Sloop was entitled to leave starting the first day he was unable to report. Sloop's argument that his July 5 absence was excused by Wagoner is unavailing. Swift's warning letters and his deposition testimony make clear that Swift had the greater decision-making ability under the leave policy.

that Congress intended the FMLA to cover medical leave precipitated by substance abuse without regard for the personal responsibility of the employee. To the contrary, Congress intended that the FMLA be "`based on the same principle[s] as . . . other labor laws that establish minimum standards for employment.'" Manuel v. Westlake Polymers Corp., 66 F.3d 758, 763 (5th Cir. 1995) (quoting a Senate report). Viewing alcoholism in the context of labor laws such as the Americans with Disabilities Act and the Rehabilitation Act, this Court has recognized that while alcoholic employees in an at-will employment context are protected from adverse employment actions based upon their medical condition, the misconduct arising from their use of alcohol has never been protected. See Little v. Federal Bureau of Investigation, 1 F.3d 255, 259 (4th Cir. 1993) (Rehabilitation Act). Finding that this regulation, as correctly interpreted by the district court, is a permissible construction of the FMLA, we give it controlling weight.

Accordingly, we affirm the district court's grant of summary judgment to ABTCO and its denial of Sloop's motion for summary judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA STATESVILLE DIVISION CIVIL DOCKET NO. 5:96CV83-V

GILBERT E. SLOOP,
Plaintiff,

vs.

ABTCo., Inc.,
Defendant.

Entered: August 18, 1998

MEMORANDUM and ORDER

THIS MATTER is before the Court on cross motions for summary judgment filed by Plaintiff and Defendant on June 30, 1997 (docs. 15, 17). Pursuant to 28 U.S.C. § 636(b)(1)(B) and the standing order of designation, this Court referred the aforesaid motion to United States Magistrate Judge H. Brent McKnight for recommended disposition. The Magistrate Judge considered the summary judgment motion and filed a Memorandum and Recommendation on February 27, 1998, recommending that Defendant's motion for summary judgment be granted and that Plaintiff's motion for partial summary judgment be denied (doc. 23). Plaintiff filed timely objections to the Magistrate Judge's Recommendation on March 13, 1998 (doc. 24).

STANDARD OF REVIEW

The Federal Magistrates Act provides that "a district court shall make a de novo determination of those portions

of the report or specific proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); Camby v. Davis, 718 F.2d 198, 200 (4th Cir. 1983); Keeler v. Pea, 782 F. Supp. 42, 43 (D.S.C. 1992). The parties were notified that failure to file written objections to the Magistrate Judge's Recommendation within ten (10) days after service of the same would constitute a waiver of the right to de novo review by the district court, Nettles v. Wainwright, 677 F.2d 404, 410 (5th Cir. 1982), and would preclude that party from raising an issue on appeal. Thomas v. Arn, 474 U.S. 140 (1985); United States v. Schronce, 727 F.2d 91 (4th Cir.), cert. denied, 467 U.S. 1208 (1984).

"The statute [28 U.S.C. § 636 (b)(1)(C)] does not on its face require any review at all, by either the district court or the court of appeals, of any issues that is not the subject of an objection." Thomas, 474 U.S. at 149; Camby, 718 F.2d 198, 200 (4th Cir. 1983); Keeler, 782 F.Supp. at 43. De novo review is not required or necessary when a party makes general or conclusory objections that do not direct the court to a specific error in the Magistrate Judge's proposed findings and recommendations. Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982). A litigant who objects only in vague or general terms to the Magistrate Judge's recommendation, thereby preventing the district court from focusing on specific issues for review, renders the initial reference to the Magistrate Judge useless and frustrating to the purposes of the Magistrates Act. Howard v. Secretary of Health and Human Services, 932 F.2d 505 (6th Cir. 1991); Keeler, 782 F. Supp. at 43.

In any event, the District Judge retains responsibility for the final determination and outcome of the case. Wallace v. Housing Authority of the City of Columbia, 791 F. Supp. 137, 138 (D.S.C. 1992). Accordingly, the Court has conducted a careful review of the Magistrate Judge's Memorandum and Recommendation in its entirety as well as

a de novo review of the portions of the Recommendation to which Plaintiff has filed specific objections.

STATEMENT OF THE CASE

Plaintiff Gilbert Sloop was employed by Abitibi-Price Corporation from 1970 through October 1992. In October 1992, Defendant ABTCO, Inc. purchased substantially all of the assets of Abitibi-Price. After the buy-out, Plaintiff became a utility lead person in the ABTCO plant.

Plaintiff is an alcoholic. Although Plaintiff did not consume any alcohol from 1970 until 1992, Plaintiff began drinking again on the night of December 25, 1992. Following this night, Plaintiff continued to drink alcohol for the next two to three weeks.

In January 1993, Plaintiff contacted Willard Swift, Human Resources Manager for Defendant, and informed him that he had started drinking and that he would need to stay out of work to get some help. With the assistance of Mr. Swift, Plaintiff was admitted to the Life Center of Galax on January 18, 1993, for treatment for his use of alcohol. Plaintiff spent 21 days at the Life Center of Galax. Plaintiff's admission and treatment at the Life Center of Galax were paid for with insurance provided by Defendant. In addition, Plaintiff was granted sick leave and paid $150.00 a week pursuant to Defendant's sick leave policy.

When Plaintiff returned to work on February 8, 1993, he was called to a meeting with Mr. Swift. Mr. Swift advised Plaintiff that he should continue with Alcoholics Anonymous meetings, continued with counseling, and refrain from the consumption of alcohol. (Defendant's Ex. 6). Mr. Swift also informed Plaintiff that any recurrence of his alcohol problem could lead to disciplinary action, including discharge. Id.

On April 21, 1993, Plaintiff had a relapse and began drinking again. He was admitted to the New River Detox

Center in Wilkes County, North Carolina, where he remained until April 24, 1993.

On June 1, 1993, Plaintiff missed work because of his consumption of alcohol. Plaintiff was again admitted to the New River Detox Center, where he remained until June 5, 1993. When Plaintiff returned to work, he was informed that he could not let his alcohol problem affect his work anymore and that any recurrence of the problem would result in immediate termination. (Defendant's Ex. 7).

Notwithstanding this warning, Plaintiff consumed alcohol on several occasions between October 31, 1993 and December 4, 1993. On October 31, 1993, Plaintiff voluntarily admitted himself to the New River Detox Center. Plaintiff was also admitted to the New River Detox Center from November 29, 1993 to December 4, 1993.

On January 3, 1994 and January 4, 1994, Plaintiff called Defendant and stated that he was sick and unable to report to work. On January 5, 1994, Plaintiff was again admitted to the New River Detox Center and remained there until January 9, 1994. When Plaintiff returned to work, he met with Mr. Swift concerning his alcohol problem. Plaintiff was informed that he would be allowed to continue working for Defendant under the following conditions:

> [Y]ou will be expected to continue your after hours treatment program and take whatever steps necessary to prevent any recurrence of the problem with alcohol.... You must also never report to work under the influence of intoxicants, and in the case of all illnesses, you will be expected to provide an approved note from a doctor. Additionally, all absences will require satisfactory verification. Please, let there be no doubt as to our intentions. <u>This is a last and final warning!</u>

(Defendant's Ex. 10).

As stated above, Plaintiff suffered a relapse and began drinking heavily during the holiday weekend of July 4, 1994. In fact, Plaintiff testified during his deposition that he suffered a "blackout" as a result of heavy drinking on July 2, 1994, and could not remember anything that occurred on July 3, 1994 or July 4, 1994. (Defendant's Ex. 12). Additionally, Ms. Sloop testified during her deposition that her husband's drinking during the weekend of July 4, 1994, was the worst she had ever witnessed. (Defendant's Ex. 11). Although Ms. Sloop transported Plaintiff to the New River Detox Center on July 4, 1994, he refused to be admitted. Plaintiff's condition was reported to the Wilkes County Sheriff's Department, and Officer Alan Flora transported the plaintiff to a physician for examination. Plaintiff was examined by a Dr. Belford a Wilkes Regional Hospital who opined that Plaintiff was a substance abuser who met the criteria for inpatient commitment. Therefore, Dr. Belford recommended that Plaintiff be held pending a district court hearing. (Plaintiff's Ex. 37 at 9). Accordingly, on the evening of July 4, 1994, Ms. Sloop signed an involuntary commitment petition against her husband (Plaintiff's Ex. 37 at 10), and officer Flora transported Plaintiff to the New River Detox Center for involuntary commitment.

On July 5, 1994, Plaintiff was examined by a medical doctor at the New River Detox Center, W.L. Bundy, to determine the necessity for involuntary commitment. After a thorough examination, Dr. Bundy concluded that Plaintiff was a substance abuser who was dangerous to himself or others. Therefore, he ordered that the Plaintiff be officially committed to the New River Detox Center pending a judicial hearing. (Plaintiff's Ex. 37 at 7).

On July 12, 1994, an involuntary commitment hearing was held before the Honorable Edgar B. Gregory, District Court Judge of Wilkes County, North Carolina. After hearing the sworn testimony of Ms. Sloop, Judge Gregory determined that Plaintiff was a "substance abuser" who presented a "[danger] to himself." (Plaintiff's Ex. at 3).

Therefore, Judge Gregory ordered that Plaintiff be involuntarily committed for a period of 180 days, including 28 days of inpatient treatment at Davidson Alcoholic Care, to be followed by some outpatient treatment at New River Substance Abuse Services. (Plaintiff's Ex. 37 at 11). He further ordered that Plaintiff take the medication, antabuse. (Id).

On the afternoon of July 4, 1994, Ms. Sloop called Plaintiff's supervisor, Alfred Wagoner, and informed him that Plaintiff would be unable to attend work the following morning. The next morning, Ms. Sloop called Mr. Wagoner again, and advised him that Plaintiff had been involuntarily committed to the New River Detox Center. Mr. Wagoner responded that Ms. Sloop would need to call Mr. Swift.

On the evening of July 5, 1994, Ms. Sloop called Mr. Swift at home and told him that she had spoken with Mr. Wagoner, and that Mr. Wagoner instructed her that it would be necessary for her to speak to him (Mr. Swift). Ms. Sloop explained to Mr. Swift that her husband had begun drinking alcohol again, and that she had successfully petitioned for his involuntary commitment at a detox center so that he could obtain treatment for his alcoholism. (Plaintiff's Ex. 2 at 4). Ms. Sloop also advised Mr. Swift that it had been recommended that Plaintiff undergo residential medical treatment at an inpatient alcoholic treatment center, and that Plaintiff would need to be out of work for several weeks. She then inquired if leave could be arranged and reminded Mr. Swift that Plaintiff had two weeks of vacation remaining. (Id.). Mr. Swift responded that he would have to call Ms. Sloop back after he talked to company officials. On or about July 7, 1994, Ms. Sloop received a call from Mr. Swift. He informed her that he had spoken with other company officials, and that it had been decided that the company would have to terminate her husband. Plaintiff was terminated by Defendant, effective July 6, 1994.

Plaintiff was treated at Davidson Alcoholic Care Center from July 12, 1994 to August 8, 1994. (Plaintiff's Ex.

33). During this time, his primary counselor was Lonnie Draper, a certified substance abuse counselor pursuant to N.C. Gen. Stat. § 90-113.30, et seq. Mr. Draper reports that Plaintiff successfully completed treatment of his alcoholism at Davidson Alcoholic Care Center, and that at the conclusion of Plaintiff's treatment program, he believed Plaintiff "would continue to work toward staying clean and sober as a recovering alcoholic." (Plaintiff's Ex. 3 at 5).

Since Plaintiff's discharge from Davidson Alcoholic Care Center, he has reportedly not consumed alcohol. In fact, Plaintiff remains in counseling and attends Alcoholic Anonymous meetings several times a week. (Plaintiff's Ex. 1, Sloop Aff. at 8). Additionally, Plaintiff currently works as a Health Care Assistant II at the New River Detox Center, where he takes care of patients who suffer from substance abuse (Plaintiff's Ex. 1, Sloop Aff. at 8).

On June 26, 1996, Plaintiff initiated this action against Defendant, alleging that Defendant violated the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 et seq., by discharging Plaintiff and by failing to grant Plaintiff a leave of absence from employment for treatment of his alcoholism. On June 30, 1997, Plaintiff filed a motion for partial summary judgment and Defendant filed a motion for summary judgment. Plaintiff contends he is entitled to judgment on the issue of Defendant's liability under the FMLA. Defendant contends it is entitled to summary judgment because Plaintiff cannot prove that Defendant violated any of the provisions of the FMLA.

ANALYSIS

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56 is a procedural device available for prompt and expeditious disposition of controversy without trial. Rule 56 provides that "[a] party seeking to recover upon a claim...may...move...for summary

judgment in the party's favor upon all or any part thereof." Fed. R. Civ. Pro. 56(a). Upon motion, "[summary] judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c).

The party seeking summary judgment initially has the burden of demonstrating the absence of a genuine issue of material fact, and his entitlement to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Following the movant's showing, the non-moving party must set forth specific facts showing the existence of a genuine issue for trial. Celotex, 477 U.S. at 317. The evidence is viewed in the light most favorable to the non-moving party. Id. All ambiguities, conclusions, and inferences arising in and from the evidence must be construed against the movant for summary judgment. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-159 (1970). In other words, summary judgment can be granted in only those cases where plain, palpable and indisputable facts exist on which reasonable minds cannot differ. However, if the non-moving party fails to present an issue of fact, summary judgment should be entered. Celotex, 477 U.S. at 317.

"The law provides no magical talisman or compass that will serve as an unerring guide to determine when a material issue of fact is presented. As is so often true in the law, this is a matter of informed and properly reasoned judgment." American Mfrs. Mut. Ins. Co. v. American Broadcasting Paramount Theatres, Inc., 388 F.2d 272, 279 (2d Cir. 1967). Although there is no established standard governing the question of what constitutes a material fact, a few general observations can be made. The notion of materiality includes only those questions that are within the range of allowable controversy in a lawsuit. See L&E Co. v. U.S.A. ex rel Kaiser Gypsum Co., 351 F.2d 880 (9th Cir.

1965). Under this standard, a fact is material if it tends to resolve any of the issues that have been properly raised by the parties. Consquently, in ruling on motions for summary judgment, courts have held that a fact or facts are material if they constitute a legal defense, or if their existence or nonexistence might affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is decided cannot prevail. See generally Kennett-Murray Corp. v. Bone, 622 F.2d 887 (5th Cir. 1980); SEC v. Seaboard Corp., 677 F.2d 1301 (9th Cir. 1982); Fishman v. Teter, 133 F.2d 222 (7th Cir. 1943).

Once the court determines what facts are material, the second element of the Rule 56(c) formulation requires it to decide whether there is a "genuine issue" concerning any of the material facts. If there is, summary judgment must be denied. See Bowles v. Batson, 61 F. Supp. 839 (D.C.S.C. 1945), aff'd 154 F.2d 566 (4th Cir. 1946); U.S. v. W.T. Grant Co., 345 U.S. 629 (1953); Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620 (9th Cir. 1977).

To determine the existence of a genuine issue, the court must engage in a rather sophisticated and careful inquiry, especially since there is no precise formula for determining when a genuine issue does or does not exist. Nevertheless, the inquiry must be made if Rule 56 procedure is to accomplish its objective of piercing the allegations of the pleadings. A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson, *supra*, 477 U.S. at 248. Nonetheless, the party opposing summary judgment may not rest upon mere allegations or denials and, in any event, a "mere scintilla of evidence" is insufficient to overcome summary judgment. Id. at 249-50. Furthermore, when the evidence of record could not lead a rational fact finder to find for the non-moving party, no genuine issue for trial exists and summary judgment is appropriate. Matsushita Electric Indust. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

B. The Family Medical Leave Act

The Family and Medical Leave Act of 1993 allows "eligible" employees of a covered employer to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total or 12 workweeks in any 12 months because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, or because the employee's own serious health condition makes the employee unable to perform the functions of his or her job. 29 C.F.R. §825.100. The Act became effective August 5, 1993, and is generally applicable to all employers who employ 50 or more employees. Eligible employees are those who have been employed by the employer for at least 12 months and who have worked at least 1,250 hours during the previous year. 29 U.S.C. § 2611(2)(A).

In order for an employee to take advantage of entitlement, he or she must provide as much notice to the employer "as is practicable" under the circumstances. 29 U.S.C. § 2612(e). In the notice, the employee must state the reason for the leave request, but it is not necessary that the employee specifically invoke the FMLA in his request. Manuel v. Westlake Tolymers Corp., 66 F.3d 758 (5th Cir. 1995). If the employer is not satisfied with the reasons stated by the employee, the employer can require "certification issued by the health care provider" of the employee to support the leave request. 29 U.S.C. § 2613.

When an employer grants leave under the FMLA, it may require the employee to take any accrued vacation or sick leave as a part of the FMLA leave. Otherwise, the leave is unpaid, although the employer is required to continue paying premiums on the employee's group benefits. 29 U.S.C. § 2612(c) and (d). Following his or her return from

FMLA leave, an employee is entitled to resume his or her former or an equivalent position with the employer. 29 U.S.C. § 2614(a)(1).

Upon proof that an employer has denied leave in violation of the FMLA, resulting in the employee's termination, an employee may pursue legal action against the employer. If the employee prevails, he or she is entitled to lost income, benefits and other damages, interest, and liquidated damages. The employee is also entitled to reinstatement to his or her former position. 29 U.S.C. §2617(a)(1).

C. Defendant's Motion for Summary Judgment

In support of its motion for summary judgment, Defendant argues that it is entitled to summary judgment because Plaintiff did not suffer a "serious health condition" as defined by the regulations on July 5, 1994 and, therefore, that he is not entitled to leave under the Family Medical Leave Act ("FMLA"). The sections pertinent to Plaintiff's claim provide the following:

> [A]n eligible employee shall be entitled to a total of 12 workweeks of leave during any 12 month period for one or more of the following:...
>
> > (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2612(a)(1).

In the instant case, it is undisputed that Defendant is covered by the Act, and that Plaintiff was an "eligible

employee" as of July 1994. What is disputed is whether Plaintiff's absence from work on July 5, 1994 was due to a "serious health condition" entitling an employee to FMLA leave is defined as "an illness, injury, impairment, or physical or mental condition" that involves:

> (1) Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility...or any subsequent treatment in connection with such inpatient care; or
> (2) Continuing treatment by a health care provider....

29 C.F.R. § 825.114(a); 29 U.S.C. § 2611(11).

The regulations promulgated under the Act explicitly state that substance abuse may be a "serious health condition" if the conditions of § 825.114 are met. However, the regulations also state that FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave. See 29 C.F.R. § 825.114(d).

"Treatment" for purposes of § 825.114(a) includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine examinations. Further, the regulations construe "continuing treatment" by a health care provider to include a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). However, a regimen of continuing treatment that includes the taking of over-the-counter medications or the performance of activities which can be initiated without a visit to a health

care provider (such as getting bed rest, drinking fluids, or exercising) is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave. 29 C.F.R. § 825.114(b).

Additionally, the FMLA provides an exclusive list of persons who qualify as "health care providers." They include:

> (1) a doctor of medicine or osteopathy;
> (2) podiatrists, dentists, clinical psychologists, optometrists, an chiropractors;
> (3) nurse practitioners and nurse mid-wives; and
> (4) Christian Science practitioners who are listed with the First Church of Christ, Scientist in Boston, Massachusetts.

29 C.F.R. § 825.118(a).

With the exception of Christian Science practitioners, a "health care provider" must be authorized to practice by the state in which he or she practices.

It is undisputed that in the last two years Plaintiff worked for ABTCO, he suffered from several relapses or recurrences of alcoholism. Specifically, Plaintiff testified in his deposition that he began drinking on December 25, 1992, despite 24 years of sobriety. (Defendant's Ex. 3, Sloop Aff. at 50). In January 1993, Plaintiff participated in a 21 day treatment program at The Life Center of Galax, which was paid for by insurance furnished by ABTCO. When Plaintiff returned to work, he was advised by a letter from Will Swift dated February 8, 1993, that ABTCO expected him to "attend all AA meetings and to participate in any and all other activities designed to avoid a recurrence" of his alcohol problem. (Defendant's Ex. 6). In addition, Mr. Swift warned

Plaintiff that a recurrence of his alcoholism "could lead to disciplinary action and even discharge." (Id.)

Despite this warning, Plaintiff began drinking again and was unable to report to work on June 1, 1993. At that time, he was admitted to a detoxification center in North Wilkesboro for treatment. Upon Plaintiff's return to work on or about June 7, 1993, Mr. Swift issued Plaintiff yet another written warning, which informed him that he was being allowed to return to work under the condition that he "not allow alcohol to affect his work anymore." (Defendant's Ex. 7). In addition, Mr. Swift's letter clearly stated that "[T]his is a last and final warning. Any recurrence of the problem will result in immediate termination." (Id.)

Plaintiff relapsed again on January 3, 1994, and reported to his supervisor that he would not be able to work because of his recurring alcohol problem. Plaintiff was again admitted to the detoxification center in North Wilkesboro, was discharged from that center on January 9, 1994, and returned to work on January 10, 1994. (Defendant's Ex. 10). By letter dated January 12, 1994, Mr. Swift informed the plaintiff, *inter alia*, that ABTCO expected him to continue participating in an after hours treatment program and to take whatever steps necessary to prevent any recurrence of his alcoholism, and that in the case of illness, he would be expected to provide an approved note from a doctor. (Id). Again, Mr. Swift stated that "[t]his is a last and final warning!"

The evidence is clear that Plaintiff continued to abuse alcohol and was committed to the New River Detox Center on July 4, 1994, due to excessive drinking. As a result, Plaintiff was absent from work on July 5, 1994. Defendant argues that Plaintiff did not suffer from a "serious health condition" on July 5, 1994, which entitled him to leave under the FMLA because he was not treated by a "health care provider." After careful scrutiny of the provisions of the FMLA and the exhibits submitted by the parties, the Court finds that Plaintiff did suffer from a serious health condition

on July 5, 1994, namely, alcoholism, and that he received treatment from at least two "health care providers" for that condition.

According to the regulations promulgated by the Department of Labor, "treatment" includes examinations to determine if a serious health condition exists and evaluations of the condition. 29 C.F.R. § 825.114. Although the health care associates who cared for the plaintiff at the New River Detox Center do not qualify as "health care providers" under the FMLA, the Court finds that Plaintiff received treatment by at least two medical doctors who, by definition, qualify as "health care providers" under the FMLA. On July 4, 1994, Plaintiff was examined by Dr. Belford at the Wilkes Regional Medical Center. Dr. Belford concluded that Plaintiff was a substance abuser who met the necessary criteria for inpatient commitment. (Plaintiff's Ex. 37 at 9). In addition, on July 5, 1994, Plaintiff was seen by Dr. W.L. Bundy at the New River Detox Center who also concluded that Plaintiff suffered from alcoholism. Furthermore, Dr. Bundy opined that Plaintiff was potentially dangerous to himself and others and, therefore, that involuntary commitment was necessary.

Despite the treatment received by the plaintiff from Drs. Belford and Bundy, the Court concludes that the plaintiff's use, or consumption, of alcohol during the weekend of July 4, 1994, precipitated his need for treatment and, therefore, he is not entitled to leave under the FMLA. See 29 C.F.R. § 825.114(d). As previously stated, the regulations specifically provide that an employee's absence due to the use of a substance, rather than for treatment, does not qualify for FMLA leave. 29 C.F.R. § 825.114(d). At the time Plaintiff was examined by Dr. Belford on July 4. 1994 (11:54 p.m.), his blood alcohol content was .26 (Defendant's Exhibit 13). On the morning of July 5, 1994, the date Plaintiff was to report to work, his blood alcohol content was .05 (Id.) Finding that the record discloses no recurrences of Plaintiff's alcoholism from January 10, 1994 to the weekend

of July 4, 1994, the Court concludes that but for Plaintiff's consumption of alcohol, treatment by Drs. Belford and Bundy would have been unnecessary.

Based on the foregoing, the Court agrees with the Magistrate Judge that the meaning of 29 C.F.R. §0825.114(d) is plain and unambiguous - that is, an employer is not required to grant an employee leave for work missed because the employee has consumed alcohol (or any other substance resulting in impairment of the senses). Rather, the Court is confident that an employee's absence from work is justified under the FMLA only when the employee is seeking treatment from a health care provider for his substance abuse, and that treatment was not precipitated by the employee's recent use of the substance. Although the law pertaining to the FMLA is scarce in light of its recent enactment, the Court is certain that Congress, in drafting § 825.114(d), did not intend for an employee to be entitled to leave for work missed due to his use of alcohol, subsequent intoxication, and involuntarily commitment.

In a somewhat similar case brought under the Americans with Disabilities Act ("ADA") and its Oregon counterpart, a district court held that "an employer [is] not... required to provide repeated leaves of absence (or perhaps even a single leave of absence) for an alcoholic employee with a poor prognosis for recovery." Schmidt v. Safeway, Inc., 864 F. Supp. 991, 996 (D. Or. 1994). Moreover, while expressing no opinion concerning the merits of a plaintiff's claim under the FMLA, the Fourth Circuit recently held that "an employee may not retroactively invoke his or her entitlement to leave under the FMLA for a previous absence from work." See Mann v. Haigh, 120 F.3d 34 (1997). Arguably, the plaintiff in the instant case has attempted to retroactively invoke his entitlement to leave under the FMLA. Although Ms. Sloop was informed by Plaintiff's supervisor on July 4, 1994 that she would need to speak to Mr. Swift concerning Plaintiff's anticipated absence from work on July 5, 1994, she failed to telephone Mr. Swift and

request leave for the plaintiff until the evening of July 5, 1994. Moreover, there is no evidence that Plaintiff, himself, has ever invoked his entitlement to leave under the FMLA other than by filing the instant lawsuit against Defendant on June 26, 1996.

It is undisputed that Plaintiff had been absent from work on many occasions prior to July 1994, and that his absence was attributable to his alcoholism. Because the Plaintiff had been specifically warned that he would be terminated if he allowed alcohol to affect his work or his attendance at work, and because Plaintiff's absence on July 5, 1994, was necessitated due to his use of alcohol (a non-qualifying reason under the FMLA), the Court finds that Defendant did not violate the FMLA when it discharged Plaintiff.

Furthermore, the Court finds that Plaintiff has failed to make out a *prima facie* case under the FMLA in accordance with Oswalt v. Sara Lee Corp., 889 F. Supp. 253 (N.D. Miss. 1995), *aff'd* 74 F.3d 91 (5th Cir. 1996). In order to establish a FMLA claim, Plaintiff must show that he is protected under the FMLA, that he suffered an adverse employment decision, and either that he was treated less favorably than an employee who had not requested leave under the FMLA or that the adverse decision was made because of his request for leave. The Court concludes that Plaintiff's claim must fail because he has established no casual connection between his request for medical leave of absence and his termination. The only circumstantial evidence that Plaintiff provides is the fact that his termination occurred while he was involuntarily committed to the New River Detox Center. Without more, coincidental timing is insufficient to create a genuine issue of material fact regarding ABTCO's motivation in this case. Moreover, Plaintiff fails to provide evidence that more favorable treatment was granted employees not exercising FMLA rights. For these and other reasons explained heretofore, the Court concludes that no reasonable jury could find that

ABTCO fired Plaintiff for exercising his FMLA rights. Therefore, the Court concurs with the Magistrate Judge that Defendant is entitled to summary judgment in its favor.

C. Plaintiff's Motion for Partial Summary Judgment

Having determined that Defendant did not violate any of the provisions of the FMLA, the Court concluded that Plaintiff's Motion for Partial Summary Judgment should be denied.

CONCLUSION

Having conducted a de novo review of Plaintiff's objections to the Magistrate Judge's Recommendation and considered all materials supporting and opposing summary judgment, the Court concurs with the findings of fact and conclusions of law specified in the Memorandum & Recommendation filed February 27, 1998, and incorporates those findings and conclusions as if specifically restated herein. The pleadings, discovery responses, and record in the instant case reveal that no genuine issue of material fact exists, and that Defendant is entitled to judgment as a matter of law. F.R.C.P. 56(c).

IT IS, THEREFORE, ORDERED that Defendant's Motion for Summary Judgment is hereby **GRANTED.**

IT IS FURTHER ORDERED that Plaintiff's Motion for Partial Summary Judgment is **DENIED.**

The Court will simultaneously file a separate judgment dismissing this matter with prejudice.

THIS the 18th day of August, 1998.

/s/ Richard L. Voorhees
RICHARD L. VOORHEES
UNITED STATES DISTRICT COURT JUDGE

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
CIVIL DOCKET NO. 5:96CV83-V

GILBERT E. SLOOP,
Plaintiff,

vs.

ABTCO, INC.,
Defendant.

Entered: August 18, 1998

JUDGMENT

For the reasons set forth in the Memorandum and Order filed herewith:

IT IS ORDERED, ADJUDGED, AND DECREED that the Motion for Summary Judgment of Defendant, ABTCO, Inc., is hereby **GRANTED**, the Motion for Partial Summary Judgment of Plaintiff, GILBERT E. SLOOP, is hereby **DENIED**, and Plaintiff's Complaint is hereby **DISMISSED ON THE MERITS.**

THIS the 18th day of August, 1998.

/s/ Richard L. Voorhees
RICHARD L. VOORHEES
UNITED STATES DISTRICT COURT JUDGE